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1952.

File No. O Forward Contracts Control/52.

Legal Department
A - BRANCH

p 9(E)

Subject:— Opinions under the Bombay Forward Contracts Control Act, 1947.

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Gen. 194 a.

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Section 8 of the Bombay Forward Contracts Control Act provides that every forward contract for the sale or purchase of, or relating to, any goods specified in the notification under sub-section (3) of section 1 which is entered into, made or to be performed in any notified area shall be illegal if it is not entered into, made or to be performed in accordance with such bye-laws, made under section 6or 7 relating to the entering into making or performance of such contracts as may eb specified in the bye-laws,..... and no claim of any description in respect of such contract shall be entertained in any civil Court. The relevant bye-laws is 65 which reads as follows:-

> "If in any contract there is a condition to deliver the goods to a specific party and if the buyer desires to tender railway receipt (given under such contract by the seller) to a third party, he (the original buyer) shall first obtain the per
> mit permission of the original seller and if he has obtained such written permission he(the original seller) shall settle refraction quality etc. With the party taking delivery. If such seller has not given such permission and still the original buyer delivers such railway receipt to the ultimate buyer, he may do so at his own risk and the (original) on seller will have the option to take the refraction ~~xxxxxx~~ quality and bagging of such lot as accepted and weight will be as stated in the railway invoice."

The delivery contract form printed at p. 99 of the Bombay Oilseeds Exchange Ltd. Bye.laws contains a clause which says that buyers shall have the option to refuse railway receipt if not tendered nine days before the due date f the contract. The bye-law as can be seen from the underlined portion thereof and the form therefore, definitely contemplates that the railway receipt given by the original sellercan be transferred and is expected to be transferred to a third party. So long as the contract conforms to this bye-law and the form it will not be declared illegal qua section 8 of the Act quoted above, although it may professedly be a contract the railway receipt in respect of which is to be transferred to a third party.

2. The question whether the Oilseeds(Forward Contracts Prohibition) Order is ~~xxxx~~ operative ~~xx~~ today has been examined

and it must be said that it is operative. The only exemption which notification No. F.& S.C. 75(2)/43, dated the 31st May 1943 provides is that of forward contracts for groundnut, linseed mustard seed, repeseed or toria seed of specified qualities or types and for specific delivery at a specified price, delivery orders, railway receipts or bills of lading against which contracts are not transferrable to third parties. It follows, therefore, that in respect of seeds mentioned in this exemption if there be a forward contract, the railway receipts in respect of which are transferable to third parties, such contract would be void under the Oilseeds (Forward Contracts Prohibition) Order 1943.

3. The question arises whether a contract in the form referred to in paragraph 1 above to which bye-law 65 applies can be accepted as a valid contract. It has been made abundantly clear that the bye-law in terms contemplates that the receipt is transferable to a third party. Prima Facia, therefore, that contract would be hit by the prohibition under the Oilseeds (Forward Contracts Prohibition) Order As has been said by the Madras High Court in the case of Uma v. Kethasamy, 1950 M.L.J. 587, before any fprward contract can fall within the notification granting exemption it must be established that one of the terms of that contract is that a delivery order or railway receipt or a bill od lading relating to it is not transferable Far from such term being established, the term in the bye-law would seem to be exactly to the contrary.

4. The only point which, therefore, remains for consideration is whether the invalidity attaching by reason of the Oilseeds(Forward Contracts Prohibition) Order is cured by the Provisions of the Forward Contracts Act and the bye-law made thereunder. The answer must be in the negative. That Act only creates a new kind of statutory illegality

It does not purport to get rid of other illegality statutory or contractual nor confer upon the contract which is entered into etc. in accordance with the bye-laws a complete immunity from all kinds of illegalities. Moreover, looking to the object and scope of the Forward Contracts Act which is relatable to entries 27 and 37 in List II and entries 1,2,4, and 10 in List III in the Seventh Schedule to the Government of India Act, 1935, and the Essential Supplies Acts under which the Orders have been kept alive which are relatable to entries 29 and 27 in List II (production supply and distribution of, and trade and commerce in, foodstuffs including edible oil seeds and oils) in respect of which the Indian Legislature was empowered to make laws under section 2 of the India (Central Government and Legislature) Act, 1946 it cannot be maintained that although the Forward Contracts Act may be later law assented to by the Governor General, it gets rid of the prohibitions created by the Order maintained in force under the Essential Supplies(Temporary Powers) Act. Both these enactments can co-exist together their scope and object is entirely different, and, therefore, there is no repugnancy or inconsistency between them.

5. The conclusion must, therefore follow that contracts which are in accordance with the form at p.59 of the said Bye-laws and to which Bye-law 65 applies are professedly contracts the intention of which was to make the railway receipts transferable to third parties; and therefore, they will come within the prohibition of the Oilseeds(Forward Contracts Prohibition) Order, 1943, and will not get the benefit of the exemption under the Notification.

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6. The foregoing opinion is based on the assumption that bye-law 65 in terms applies to the contract. Whether it does so or not would depend on two considerations, the nature and terms of the contract and also upon the particular kind of seed which it relates. It is only edible oil seeds which come within the prohibition under the Oilseeds (Forward Contracts Prohibition) Order. Forward trading in other oilseeds is not prohibited under the said Order and it can, therefore be maintained that bye-law 65 is intended to apply only to such other seeds, i.e., excluding edible oilseeds. There is a general presumption against illegality and therefore bye-law 65 cannot be so construed as to extend it to forward contracts which are prohibited by the Order. It is, therefore, permissible to argue that the bye-law does not apply to the contracts now in issue and that such contracts, despite the recital in Form at p.50 would be outside the scope of the bye-law. It can then be held that the recital does not relate to transfer of the railway receipt to a third party and the contracts would then be analogous to those governed by the judgement of Chagla C.J. in the case of Daji v. Visanji Hansraj. Moreover, if, in fact, the transactions of the Exchange show that the contract did not intend that the receipts should be transferred by the buyer or sell to a third party, then also there would be no scope for attracting the bye-law merely on the ground that the form says that the contract is made subject to the bye-laws. Such contracts would not then be invalid on the ground that they are prohibited by the Oilseeds (Forward Contracts Prohibition) Order.

7. Now that the matter has been taken to the High Court, the proper course would be for the Exchange to intervene in that litigation and to urge the contentions indicated in the preceding paragraph and to press for the expeditious disposal of the suit on the ground that settlement is being unduly delayed and the business of the Exchange is being hampered.

Sd/ P.M. Lad. 2/5

Remembrancer of Legla Affairs.

U.R. to F.D. No. 6965 dated the 3rd May 1952.

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The Bombay Oil Seeds Exchange Ltd. which is a recognised association under the Bombay Forward Contracts Control Act, 1947, requests Government to take steps to resolve the deadlock which has occured in the oil seed market in consequence of the civil suit filed by certain dealers in the Bombay High Court contending that forward contracts entered into by the members of the Association in accordance with the bylaws of the Association sanctioned by Government were illegal. The main ground on which the contention is based is that the said contracts offend against the Forward Contracts (oil Seeds) Prohibition Order 1943, issued by the Government of India under rule 81 of the Defence of India Rules.

2. The Directors of the Bombay Oil Seeds Exchange Ltd. relying on the advice of their Solicitors suggest that the Bombay Government should suggest to the Govt. of India to exempt all contracts entered under the auspices of the Association from the operation of the above order. It is also suggested that the said exemption should be given retrospective effect. Such proposal, if accepted by the Government of India would enable the Association to put forward a valid defence to the xk civil suit which has been filed in the Bombay High Court. One can understand the anxiety of the Association to put forward a defence to the civil suit which has given rise to a deadlock in the oil seeds market. But the legal advice given to the Association in this matter appears to be entirely wrong. As stated in the note of D.S.F.D. it was stated by the Govt. of India R&A that no order would now be made by the Govt. of India under the Essential Supplies (Temporary Powers) Act, giving exemption to the oil seeds exchange retrospectively from the operation of the order of 1943.

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D.S.F.D. states that Shri Pakwasa, Solicitor of the Oil Seeds Exchange was not satisfied with this view. I had discussion with Shri Pakwasa and I entirely agree with R.L.A. (Shri. Lad) that it would not be improper on the part of the Bombay Government to approach the Government of India with a request that exemption should be granted to the Oil Seeds Exchange with retrospective operation, but I have not doubt that if any such exemption is given it would be entirely illegal and of no effect. The principle of law is that unless the parent Act itself clearly authorizes the issue of a notification with retrospective effect, it must be presumed that such a notification is forbidden. The principle is self-evident and does not require any authority in its support. But if any authority is needed, it will be found in the judgement of the Calcutta High Court in Stewart v. Brojendra (2 F.L.J. at p.117). Moreover, apart from its legality in view of the pendency of the suit in which the validity of the transactions has been challenged on the basis of the Order of 1943, any attempt on the part of the Government to issue an Order exempting the Association from the operation of the said Order would be open to objection. I, therefore, agree with D.S.F.D. that the suggestion made by the Directors of the Association and their Solicitor should not be accepted by Government.

3. I however agree with D.S.F.D. that inorder to resolve the present deadlock in the Oil Seeds Market, it is necessary for Government to take certain steps. It is not clear up to what time the Government of India propose to continue the operation of the order of 1943. If it is their intention to continue it in operation till 26th January 1956, i.e. the date on which the Essential Supplies(Temporary Powers) Act, 1947, is to be in operation it will be worthwhile to ascertain from the Government of India whether they will be inclined to exempt the Bombay Oil Seeds Exchange from its operation in future (though not retrospectively) and if they are so inclined, to issue an order to the effect as it has been done in the case of the East India Cotton Association. If the Government of India are not so willing, steps may to a certain extent weaken the defence which may be

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* Steps should be taken to amend the by-laws and the terms of Contract attached thereto in the manner suggested by D.S.F.D. It is hoped this

steps should be taken to amend the byelaws and the Forms of Contracts attached thereto in the manner suggested by D.S.F.D. It is true that his step may to a certain extent weaken the defence which may be available in the suit filed in the High Court But as pointed out by R.L.A. in his opinion No. 6965 dated the 3rd May 1952 referred to by D.S.F.D., it would be difficult to contend successfuly that some of the transactions entered into by the members of the Exchange do not offend against the Order of 1943. The decisions of the Bombay and Madras High Courts, wh where the question has been considered, clearly show that the byelaws of the Exchange do not over-ride the Order of 1943 and the transactions entered into in accordance with the said bylaws would not be valid if they offend against the Order of 1943 (I.L.R. (1951) Mad 723, (1950) 1 M.L.J. 567).

4. One suit has been already filed in the Bombay High Court. I am informed that another suit of the same type has been also filed. Written statements in the suits are still to be filed. If, therefore, any amendment in the bylaws is to be made it should be done in consultation with the Advocate General who will appear in the defence of the suits.,

Sd/ J.R.Dhurandhar.
21/10

o.c.

Additional Secretary to Government.

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The following clause shall be incorporated and shall always be deemed to have been incorporated in each of the Ready Delivery Contracts, Delivery Contracts and Bazar Bhara Contracts for such of the oilseeds to which the oil seeds (Forward Contracts Prohibition) Order of 1943 is for the time being made applicable under the law for the time being in force :-

"This contract is for specific quality or type and for specific delivery at the price specified above and the delivery order, railway receipt or Bill of Lading against this contract shall not be transferable to third parties."

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